United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original - Affidavit of Mailing

74-1877

To be argued by
EDWARD R. KORMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1877

UNITED STATES OF AMERICA,

Appellant,

—against—

JUAN ANTONIO SUAREZ,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
Assistant United States Attorney,
Of Counsel.

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Preliminary Statement

United States of America appeals from the Order of the United States District Court for the Eastern District of New York (Dooling, *J.*), dated November 9, 1973, granting the motion of appellee Juan Antonio Suarez for a judgment of acquittal. Suarez and co-defendant Alberto Vera were charged in a three-count indictment with possession with intent to distribute, distribution and conspiracy to distribute approximately one-eighth kilogram of cocaine on or about January 24, 1973. Count One charged the conspiracy in violation of Title 21, United States Code, Section 846; Counts Two and Three charged the substantive offenses in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

Immediately prior to the commencement of trial on October 10, 1973, co-defendant Vera pled guilty to Count Two of the indictment. The trial of appellee Juan Antonio Suarez began on the following day. After the Government rested and at the conclusion of the case, counsel for Suarez moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. These motions were denied by Judge Dooling and the case was delivered to the jury for its consideration.* Thereafter, the jury reported that it was unable to reach a verdict and the trial was then terminated. Judge Dooling declared a mistrial and counsel for Suarez later renewed his motion for a judgment of acquittal. In a Memorandum and Order, dated November 9, 1973, Judge Dooling concluded that the evidence was insufficient to sustain the charges of aiding and abetting the distribution of cocaine and conspiracy to distribute cocaine. Accordingly, Judge Dooling granted Suarez' motion for a judgment of acquittal on Counts One and Two. The Government now appeals.

The issues raised on this appeal are 1) whether the order of the District Court is appealable, and 2) whether the evidence introduced at trial, viewed in the light most favorable to the Government, is sufficient to sustain the charge of aiding and abetting the distribution of cocaine and conspiracy to do the same.

Questions Presented

1. Whether the Double Jeopardy Clause bars the United States from appealing an order of the District Court granting appellee's motion for a judgment of acquittal after a mistrial had been declared when the jury was unable to reach a verdict.

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* Count Three of the indictment was dismissed by Judge Dooling at the conclusion of the Government's direct case as being duplicitous (62-65; A. 8a).

2. Whether the evidence at trial, when viewed in the light most favorable to the Government, was sufficient to allow the jury to find beyond a reasonable doubt that appellee conspired in the sale or aided and abetted its completion.

Constitutional Provision and Statute Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *

Title 18, United States Code, Section 3731, as amended, 84 Stat. 1890, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more courts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

Statement of the Case

A. The Government's Case

The Government's main witness at the rather brief trial was New York City Police Officer, Jose Luis Guzman. Working in an undercover capacity, Guzman entered the Mi Bohio Bar in Jackson Heights, Queens, at approximately 9:45 P.M. on the evening of January 23, 1973 (20). Officer Guzman was accompanied by Alfredo Valdes, a police informant, who, like Suarez, was Cuban, and a regular pa-

tron at the Mi Bohio Bar (20, 71-72).* While both were engaged in general conversation with the barmaid, Valdes asked her where he might find Juan (Suarez) and the barmaid responded that Juan was likely to arrive at the bar later that night (20). While waiting for Suarez to arrive, Officer Guzman observed co-defendant Vera talking with a group of men at the end of the bar (20).** Vera left the Mi Bohio Bar and shortly thereafter Suarez finally arrived, at approximately 11:10 P.M. (21). Suarez immediately approached the informer, Valdes, who in turn introduced Suarez—by his first name—to Guzman (21).

The conversation quickly turned to the subject of cocaine. Valdes told Suarez that Guzman wanted to buy one-eighth kilogram of cocaine.*** Guzman, for his part, explicitly instructed Suarez that only cocaine of good quality at a reasonable price would be acceptable (22). Suarez, pointing to the barmaid, stated: "We have to wait for Gina's husband" (22).**** Telling Suarez that he was about to leave the bar, Guzman asked Suarez to either set up a meeting with Vera or, at least, "tell the man that I was looking for an eighth of a kilogram of cocaine for the next day between seven and eight P.M." (22). Suarez agreed but he encouraged Guzman to return to the bar later that same night in order to talk with Vera (22-23). Before Guzman and his informant left the bar,

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* Defendant Suarez revealed at trial that the Mi Bohio Bar was in fact owned by his wife (70).

** Throughout his direct examination, Guzman referred to Alberto Vera as Alberto Zapato, the latter name being an alias of co-defendant Vera.

*** That conversation was conducted in Spanish, as were the conversations to follow. Officer Guzman testified that he was fluent in the Spanish language (25).

**** The allusion here is to Vera. Suarez, upon direct examination, said that the very reason he knew Vera was because the latter consorted with the barmaid, Gina, who was employed by Suarez' wife (72).

Suarez questioned whether Guzman "only wanted to purchase one-eighth of a kilo . . ." (23). Guzman explained that that until he knew the quality and price of the cocaine, he was only interested in purchasing one-eighth kilo (23). Suarez cautioned Guzman to avoid certain "hot" bars in Queens, naming specifically Las Palmas and the Jaguar Lounge (23-25). Suarez also mentioned a particular individual, apparently known to Guzman as a drug dealer, who "was doing good business at this time" (23, A. 9a).*

Guzman and the informant completed their discussion with Suarez and left the bar shortly before midnight. They returned to the bar shortly after midnight and were immediately approached by Suarez (25-26). Suarez gestured across the bar in the direction of co-defendant Vera and stated that "he was going to talk to the man now" (26). After a short conversation with Vera, Suarez came back with Vera, who introduced himself to Guzman and stated that "Juan had told him" that Guzman was "looking for one-eighth kilo of cocaine" (26).** Vera, like Suarez before him, inquired if Guzman wanted more than one-eighth kilogram of cocaine (27). Unsure of the cocaine's quality, Guzman persisted in his original bid.

The four men, Suarez, Vera, Guzman and Valdes, sat together at the bar at which time the price and quality

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* To Guzman, a trained agent with several years of experience in undercover police work (19), the implication was clear: "[T]he way he stated the bars were hot, to my own personal knowledge it would only mean the bars are under surveillance by different law enforcement agents or that too many drug arrests have been made at those locations" (24).

** Called as a rebuttal witness by the Government, Vera testified that Suarez had indeed informed him at that point that two people were interested in some "business of cocaine, drugs" (92-93, 110, 115-116). Furthermore, Vera's recollection was that Suarez himself had introduced Vera to Guzman (93, 115).

of the cocaine was negotiated. With Suarez joining in the discussion, final arrangements for the actual delivery of the drugs were agreed upon. Vera agreed to meet Guzman at the bar between 7 P.M. and 8 P.M. later that same day to deliver the cocaine at that time (27-28, 41, 111-112).*

At approximately 7:40 P.M. on the evening of January 24, 1973 the deal was consummated; Guzman purchased the cocaine from Vera for $2,300, a sum lower than that agreed upon earlier (28-29, 98). The actual sale took place in the Mi Bohio Bar. Suarez was apparently not present during the actual sale nor did he, according to Vera, receive any of the proceeds (105).

When called by the Government to offer rebuttal testimony, Vera referred to a conversation that took place between Suarez and him about three days after the sale to Guzman (100). Vera had asked Suarez whether Guzman and Valdes were reliable, since Vera had been solicited by Valdes in the interim to make another drug sale, involving a quantity of cocaine twice that of the initial transaction (100-102). Fully informed by Vera as to the nature of this anticipated transaction, Suarez assured Vera that he need expect no problems in dealing with Valdes and Guzman, for Suarez had known Valdes, a fellow Cuban, for many years (102).

B. The Defense

Suarez testified on his own behalf. He denied ever having seen or spoken to Guzman (71, 74). While he did recall talking to Valdes (the informant) on the night in

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* It should be noted that Vera's testimony on this score differed somewhat from that of Guzman. Vera acknowledged that Suarez was "about four feet" away from the buyer and seller during the entire negotiation; however, Vera was uncertain whether Suarez ever asked questions or otherwise commented on the dickering (97-98).

question, Suarez testified that the two of them merely exchanged pleasantries; when Valdes asked for Vera, Suarez pointed out Vera for Valdes (71). Suarez admitted that he knew Vera, but only because Vera was the paramour of the barmaid (72).

In short, Suarez disclaimed any knowledge of the illicit drug transaction.

ARGUMENT

POINT I

Because re-trial of appellee Suarez would not violate the Double Jeopardy Clause, this Court has jurisdiction to decide this appeal.

The Criminal Appeals Act, as amended by the Omnibus Crime Control Act of 1970, 84 Stat. 1890 (18 U.S.C. § 3731), was expressly intended to authorize an appeal from an order of a district court terminating a criminal prosecution in all cases in which the Constitution permits. As noted recently by Judge Friendly in the majority opinion in *United States* v. *Jenkins*, 490 F.2d 868, 870 (2d Cir. 1973), *cert. granted*, No. 73-1513, May 28, 1974:

> Congress intended to extend the Government's right of appeal in criminal cases as far as it constitutionally could. If the language of the statute left any doubts on that score, they would be set at rest by the report of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., No. 91-1296, at 4-13. The appeal here will therefore lie unless the Double Jeopardy Clause prevents interference with appellee's acquittal.

For the reasons set forth below, it is respectfully submitted that the exercise of this Court's jurisdiction in this

appeal would do no violence to the protections provided by the Double Jeopardy Clause.

Because double jeopardy is the sole consideration in determining the jurisdiction of this Court, at the outset it is worthwhile to consider perhaps the only two areas of unanimity in the perplexing arena of double jeopardy litigation as it relates to the issue of government appeals. First, the protections afforded by the Double Jeopardy Clause are not absolute. Retrial is permitted after a trial is terminated prematurely when "manifest necessity" or the "ends of public justice" requires. *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824). See *Illinois* v. *Somerville*, 410 U.S. 458 (1973); *United States* v. *Jorn*, 400 U.S. 470 (1971). Second, it is equally well-settled that in determining the appealability of a district court order terminating a prosecution, the examination must focus not on the label or characterization of the order affixed by the district court, but rather on the substance of what was accomplished and, presumably, the context in which the district court's action was taken. *United States* v. *Sisson*, 399 U.S. 267 (1970); *United States* v. *Jenkins*, *supra*.

With these preliminaries firmly in tow and clearly in focus, a brief review of Judge Dooling's action in this case can now be accomplished. At the completion of the Government's direct case, which consisted of primarily the testimony of undercover officer Guzman, appellee moved for a judgment of acquittal. Judge Dooling denied the motion. Appellee's motion was renewed at the close of the entire case and once again denied. The case was then delivered to the jury and significant things then began to happen. The jury reported to Judge Dooling that it was unable to agree on a verdict. Out of "manifest necessity", a mistrial was declared. It cannot be disputed that at this point appellee could have been re-tried without violating the Double Jeopardy Clause. Accordingly, for double jeopardy purposes, the prosecution immediately assumed a pre-trial

posture and appellee's successful motion which followed was made in that context. In essence, appellee's renewed application was akin to a pre-trial motion to dismiss the indictment based on undisputed facts, namely the evidence at trial viewed in the light most favorable to the Government. Viewed in this light, it cannot be said there exists any substantial difference between the judgment of acquittal ordered by Judge Dooling and an order dismissing an indictment. *Ex parte United States,* 101 F.2d 870, 878 (7th Cir. 1939).

This Court has recently had the opportunity to determine the appealability of an order of a district court dismissing an indictment prior to trial based on facts contained in the defendant's Selective Service file and supporting papers. (This Court held that the district court had erroneously concluded that the defendant had not received adequate notice of his duty to report for a physical examination.) *United States* v. *Velazquez,* 490 F.2d 29 (2d Cir. 1973). A divided panel concluded that the Double Jeopardy Clause did not bar an appeal from the order dismissing the indictment against Velazquez and observed (490 F.2d 34-35):

> The district court's granting of Velazquez' motion presented a different situation [from the usual case in which the Double Jeopardy Clause bars an appeal]. There was no trial. There was no evidentiary hearing. There was, in fact, no introduction of evidence as commonly understood in our adversarial system. There was no stipulation of facts. Rather the court went to the motion papers of the defendant, which included copies of entries in his Selective Service record, and without giving either side an opportunity to be heard, and without even having the defendant appear in open court, concluded as a matter of law that the defendant had been deprived of due process * * * [and that the indictment should be dismissed].

Presumably, a different result would have followed if there had been a hearing, or if the dismissal had been based upon stipulated facts.

It is respectfully submitted that *Velazquez* was decided correctly on its facts, but that dictum in the opinion regarding the availability of an appeal from a pretrial order dismissing an indictment in a criminal case should not be followed. The "ethereal quality of the distinctions drawn by the [Velazquez] majority", as Chief Judge Kaufman aptly phrased it in his dissenting opinion in *Velazquez* (490 F.2d 48),* is based largely on a misunderstanding of the purpose of the Double Jeopardy Clause and an erroneous reading of the holdings of the Supreme Court.

It is true that the majority in *Velazquez* observed that (490 F.2d 33):

> The Supreme Court has recently cautioned that the question of assessing whether jeopardy attaches is not to be decided by any mechanical test. *Illinois* v. *Somerville,* 410 U.S. 458 (1973); *United States* v. *Jorn,* 400 U.S. 470 (1971); *United States* v. *Sisson,* 399 U.S. 267 (1970). Accordingly, it is not wholly dispositive of the claim raised by *Velazquez* to state that since the jury was neither waived nor empaneled, jeopardy could not have attached, although this gives rise to a strong presumption.

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*Chief Judge Kaufman would have dismissed the appeal because the order of the District Court was an "acquittal". "It is fundamental", he observed, "that a defendant, once acquitted, may not *again* be placed in jeopardy for the same offense" (490 F.2d 39, (emphasis added)). Chief Judge Kaufman, however, did not explain when Velazquez had *initially* been placed in jeopardy. While in the present case, appellee was clearly placed in jeopardy at his first trial, the order of the District Court came in the wake of mistrial. Accordingly, the protection against being tried a second time for the same offense is not applicable in these circumstances.

But, the test for determining when jeopardy has attached—the commencement of a trial—is not "mechanical"; it instead reflects the basic considerations underlying the Double Jeopardy Clause, i.e., that barring the kind of "manifest necessity" present here, a defendant should not be subject to the "hazards of trial and possible conviction more than once for an alleged offense." *United States* v. *Green,* 355 U.S. 184, 187. Moreover, there is nothing in either of the cases cited by the *Velazquez* panel which questions the rule that jeopardy attaches only upon the commencement of a trial before the trier of fact. *Sisson* and *Jorn* both involved orders entered after the commencement of trial and both restated it (399 U.S. 303-304; 400 U.S. at 479); *Illinois* v. *Somerville* merely cautioned that there is no "mechanical formula by which to judge the propriety of declaring a mistrial" after jeopardy attached (410 U.S. at 462). It did not question the basic rule that "* * * jeopardy 'attache[s]' when the first jury [is] selected and sworn" (410 U.S. at 467).

While the present case does present a situation different from that in *Velazquez,* the difference is not one of substance. Judge Dooling's proper declaration of a mistrial meant that appellee could have been retried and, in effect, that jeopardy had become "unattached". Because the defendant was not in jeopardy at the time Judge Dooling granted appellee's motion for a judgment of acquittal, and because he could have been retried, an appeal from the order terminating the prosecution prior to that trial is not barred by the Double Jeopardy Clause.*

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* The issue of the appealability of pretrial and post-verdict orders dismissing indictment is presently before the Supreme Court in three cases. *Serfass* v. *United States,* 492 F.2d 388 (3d Cir. 1974); *United States* v. *Jenkins,* 490 F.2d 868 (2d Cir. 1973); *United States* v. *Wilson,* 492 F.2d 1345 (3d Cir. 1973). When the briefs to be filed by the United States are ready we will file them with this Court and send counsel for the appellee copies.

POINT II

Viewed in the light most favorable to the Government, the evidence was sufficient to allow the jury to find beyond a reasonable doubt that appellee conspired to distribute cocaine and aided and abetted its distribution.

The Government contends that Judge Dooling misjudged the sufficiency of the evidence of appellee's participation in the illicit drug transaction. The District Court's conclusion that the evidence was insufficient to sustain the charges flies in the face of the language of 18 U.S.C. § 2 * as well as the controlling precedents dealing with the degree-of-involvement issue.

It is beyond dispute that guilt cannot be established by mere association or coincidental presence at the scene of a crime. *Ramirez* v. *United States*, 363 F.2d 33, 34 (9th Cir. 1966); *United States* v. *Vilhotti*, 452 F.2d 1186, 1188 (2d Cir. 1971), *cert. denied*, 406 U.S. 947 (1972); *United States* v. *Kearse*, 444 F.2d 62, 63-64 (2d Cir. 1971). Questions of vicarious liability arise, however, once such nominal association becomes transformed into purposive participation. In *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949), the Supreme Court said, quoting Judge Learned Hand in *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938):

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed'."

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* Title 18, United States Code, Section 2(a) provides as follows:

> "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

The Government submits that the evidence adduced at trial demonstrates convincingly that appellee's crucial participation met, if not surpassed, the *Peoni* standard. *United States* v. *Garguilo*, 310 F.2d 249, 252-54 (2d Cir. 1969).

In concluding that the level of appellee's participation in this case was not sufficient to permit the jury to find beyond a reasonable doubt that appellee either conspired in the distribution of cocaine or aided and abetted such distribution, the District Court relied principally upon *United States* v. *Moses*, 220 F.2d 166 (3rd Cir. 1966); *Morei* v. *United States*, 127 F.2d 827 (6th Cir. 1942); and *Robinson* v. *United States*, 262 F.2d 645 (9th Cir. 1959). The Government submits that those cases are readily distinguishable from the present one.*

In *Moses*, defendant's conviction for aiding and abetting the illegal sale of heroin was reversed because the evidence revealed the defendant to be merely an addicted customer of the drug dealer, not a collaborator in the heroin sale. Her conduct was confined to introducing the buyers to the seller and vouching for them. The court pointedly noted that the defendant had been indicted under a drug control statute (no longer in force) that treated buying and selling as separate and distinct offenses altogether-unlike the statute involved in the instant case, which conjoins those offenses in the single phrase "to . . . distribute." 21 U.S.C. §841(a)(1) (1970). Since Moses had been charged in connection with the crime of selling alone, the fact that the proof went exclusively to her actions at the behest of the buyers militated against her conviction for complicity in the

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* Insofar as the lone remaining authority of the District Court, *People* v. *Gordon*, 32 N.Y. 2d 62, 295 N.E. 2d 777, 343 N.Y.S. 2d 103 (1973), concerned, in the words of Judge Dooling, "a substantially different statute" (A. 14a), suffice it to say that the Government agrees that *Gordon* has little bearing on the matter at hand.

selling. 220 F.2d at 168. Given that the Comprehensive Drug Abuse Prevention and Control Act of 1970 now specifies a general offense of participation in the transaction viewed as a whole, the analysis employed by the court in *Moses* is singularly restricted to a former statute and hence inapposite here. See also, *United States* v. *Jackson*, 482 F.2d 1264, 1267 (8th Cir. 1973) (*Moses* distinguished on its factual and statutory analyses).

In *Morei*, the court reversed the conviction of a co-defendant, Dr. Platt, on charges of aiding and abetting a heroin transaction. The only evidence of Dr. Platt's involvement consisted of the following: 1) the physician was approached by an informer to supply heroin in order to "soup" race horses; 2) lacking a store of heroin, the physician gave the informer the name and address of defendant Morei, advising the informer "to see Morei and tell him that the doctor had sent him and that 'he will take care of you';" and 3) the informer gave Dr. Platt certain inside information on race-horse fixing. 127 F.2d at 829-30.

In *Robinson*, the court found the evidence insufficient to sustain the conviction of one defendant, Robinson, who referred an informer on several occasions to a named heroin supplier. One of those referrals was given while Robinson and the informer met at Robinson's home. Faced with such skeletal evidence, the court there understandably invoked the authority of *Morei*. Taken together, *Morei* and *Robinson* seem to hinge on modest referrals, without more.

In the instant case, the level of participation is clearly greater than that found in any of the foregoing cases. Appellee entered the bar and approached the informer, Valdes, who expressed the intent of the undercover agent, Guzman, to purchase cocaine. Without hesitation, appellee responded that the dealer, Vera, was temporarily absent;

the agent then requested that appellee make an appointment with the dealer to discuss the prospective drug transaction. After agreeing to arrange such an appointment, appellee informed the agent that, in light of the dealer's imminent return, a meeting might be possible that night. Preliminarily, in an apparent effort to give shape to the anticipated negotiations, appellee inquired whether "only . . . one-eighth" of a kilo was desired. Upon receiving the agent's specification of the amount sought, appellee warned Guzman about "hot" bars in the neighborhood. He mentioned the name of a reputed drug dealer in the course of that discussion and assured Guzman that the dealer was doing a good business in the area. Following a brief departure, both Guzman and the informer returned to the bar, whereupon appellee approached Guzman, identified the dealer, and went over to the latter's side to set the transaction in motion. Accompanied by appellee, the dealer approached Guzman and Valdes, introduced himself, and the four men then sat together at the bar and discussed the anticipated transaction.

An additional indication of appellee's active participation was supplied by the testimony of the dealer, Vera, that he had been reassured by appellee, subsequent to the completion of the one-eighth sale, that he need have no fear of extending his cocaine commerce with Valdes and Guzman beyond the initial transaction.

Consistent with the Government's position that the evidence here was sufficient is the carefully reasoned opinion of the majority in *United States* v. *Atkins*, 473 F.2d 308 (8th Cir. 1973), which the District Court adverted to equivocally as "pay[ing] at least lip service to the cases just discussed" (A. 14a). *Atkins* effectively distinguishes *Morei*, *Moses* and *Robinson* in the course of finding enough evidence to support defendant's conviction for aiding and abetting a heroin purchase.

The evidence in *Atkins* more closely approximates that in the instant case than the meager referrals and introductions reviewed iin the District Court's authorities. When asked by an agent of a heroin importer if she knew of any buyers, Atkins replied that she did not know anyone, but that "she would see." 473 F.2d at 310. Shortly thereafter, Atkins introduced the importer's agent to a person who eventually purchased a quantity of heroin. For some time after the deal had been completed, Atkins and the importer's agent continued to meet. One of those post-transaction conversations highlighted the obvious displeasure of the two go-betweens with the deal as struck. The majority found *Morei* distinguishable because Atkins, unlike Dr. Platt, actively sought out the buyer, personally introduced the buyer in a public place, remained at the table in the bar during the buyer's conversation with the importer's agent, and expressed an interest in the transaction on several occasions, even after the consummation of the sale. *Robinson* was distinguished on like grounds. Finally, the *Atkins* court distinguished *Moses* on its precise facts, without mention of the underlying issue of statutory construction in *Moses*. After again recounting the affirmative acts of Atkins in bringing the buyer together with the seller's agent for a meeting in the bar, the court stated:

> Moreover, unlike the *Moses* case, the appellant [Atkins] *could have left the bar* after the introduction had she not been interested in seeing the purchase consummated, while the defendant in the *Moses* case would not be expected to leave her own home. Further in this case, as opposed to the *Moses* case, there is evidence of a *continuity of interest* in the purchase even after the consummation of the purchase. *Id.* at 312 (emphasis added).

The degree of appellee's involvement extended well beyond the bare referrals and introductions seen in the Dis-

trict Court's authorities. The evidence is convincing that appellee was acting to further the venture. Under any reasonable construction of the *Peoni* standard, it is patently obvious that appellee was a participant rather than a casually knowledgeable spectator. *United States* v. *Garguilo, supra* at 254. As this Court noted in Garguilo, *"evidence of an act of relatively slight moment may warrant a jury's finding participation in a crime."* 310 F.2d at 253 (emphasis added). See also *United States* v. *Manna,* 353 F.2d 191, 192 (2d Cir. 1965), *cert. denied,* 384 U.S. 975 (1966); *United States* v. *Wilson,* 342 F.2d 43, 45 (2d Cir. 1965) (rather small degree of assistance required to render a participant an aider or abettor) (dictum). Contrary to the impression of Judge Dooling that appellee played but a "neuter role," the nexus between appellee and the transaction, like that between him and his confederate, Vera, admits of no inadequacies as a matter of law. It simply strains common sense to assert, as the District Court did here, that "it cannot be said in any sense that the transaction was one of Suarez's procurement . . ." (A. 14a) or, more significantly, that appellee did not "aid and abet" the transaction. See *United States* v. *Jackson, supra* at 1267.*

Indeed, Judge Dooling, having characterized appellee's role as that of a "broker" at the conclusion of the Government's direct case (61), finally concluded that "[t]he evidence certainly shows that Suarez completely understood

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* Assuming *arguendo* that the District Court was correct in its finding that appellee lacked "any interest in it as a transaction" (A. 14a), such a determination carries no weight in this Circuit. It is not necessary that an aider and abettor have a direct financial interest in illegal sales of narcotics. *United States* v. *Manna, supra* at 192-93; *United States* v. *Blazer,* 309 F.2d 92, 93 (2d Cir. 1962). Failure to show that defendant shared in the proceeds of the venture does not by itself negative the sufficiency of his participation. See, e.g., *United States* v. *Terrell,* 474 F.2d 872, 876 (2d Cir. 1973).

the nature of the transaction which Guzman wanted to make, and knowing it, introduced Guzman and Valdes to Vera" (A. 14a).*

Judge Dooling's unequivocal finding that appellee was fully aware of the cocaine transaction, coupled with the evidence of appellee's purposeful and significant contribution to the transaction, belies the District Court's conclusion that the evidence was insufficient to support the charges.**

CONCLUSION

The Order of the District Court should be reversed.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,

RAYMOND J. DEARIE,
Assistant United States Attorney,
Of Counsel.

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* Judge Dooling went further and ventured his own definition of broker, while correcting defense counsel's claim that the evidence had to show that appellee had a financial interest in the transaction:

> Mr. Mushkin: Well, I think broker speaks in terms of intention to receive a compensation.
>
> The Court: No, intention to unite people in the making of a transaction, and that he did do (61).

** The United States Attorney's Office wishes to acknowledge the invaluable assistance of Mr. Richard F. Guay in the preparation of this brief. Mr. Guay is a second year student at New York University School of Law.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 11th day of July 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~x~~two copies of the brief for the appellant, of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Morrow D. Mushkin, Esq.
600 Old Country Road
Garden City, New York

Sworn to before me this
11th day of July 1974

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1975

Deborah J. Amundsen

DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19____

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

_____, 19____

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT CO
Eastern District of New Yor

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within ___ _____is hereby admitted.

Dated: _____, 1

_____

Attorney for _____

FPI-LC-5M-8-73-7355